

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs April 2, 2007¹

LESLIE ROEHM REESE v. JEFFREY MARK KLOCKO

**Appeal from the Circuit Court for Davidson County
No. 03D-2454 Carol Soloman, Judge**

No. M2005-02600-COA-R3-CV - Filed on May 16, 2007

Leslie Roehm Reese (“Wife”) filed a complaint seeking a divorce from Jeffrey Mark Klocko (“Husband”). Husband filed a counter-claim also seeking a divorce. While this litigation was pending, Husband was convicted of sexually abusing his step-daughter and was sent to prison. After Husband was sent to prison, his attorney withdrew from the case. Thereafter, Husband filed a pro se motion seeking to participate in the divorce trial by telephone. The Trial Court never ruled on Husband’s motion and proceeded with the trial without Husband being allowed to participate. Husband appeals claiming, among other things, that the Trial Court erred when it failed to rule on his motion seeking to participate in the trial by telephone. We agree with Husband, vacate the judgment of the Trial Court, and remand for further proceedings.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the
Circuit Court Vacated; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Jeffrey M. Klocko, pro se Appellant.

J. Robin McKinney, Jr., Nashville, Tennessee, for the Appellee, Leslie Roehm Reese.

¹ This appeal was assigned to this panel on April 2, 2007.

OPINION

Background

In October of 2003, Wife filed a complaint seeking a divorce from Husband after a marriage lasting a little over five years. The parties have one child, a son, who was born in October of 1998. As grounds for divorce, Wife alleged Husband was guilty of inappropriate marital conduct or, in the alternative, that irreconcilable differences had arisen between the parties. Wife further claimed that Husband was being investigated for sexually abusing Wife's fourteen year-old daughter from a previous marriage.

Husband's answer to the complaint denied the pertinent allegations contained therein, including the allegations that he sexually assaulted his step-daughter. Husband also filed a counter-complaint seeking a divorce from Wife. Husband alleged Wife was guilty of inappropriate marital conduct or, in the alternative, that irreconcilable differences had arisen between the parties.

In October of 2004, Husband filed a motion requesting the Trial Court order an independent appraisal of the parties' marital residence which, according to Husband, was "the only marital asset at issue and the fair market value needs to be established for an equitable property division." The Trial Court granted the motion and ordered the marital residence to be appraised by Don Turner.²

In April of 2005, Wife filed a motion to amend her complaint seeking to assert Husband's conviction of a felony as an additional ground for divorce. According to Wife:

[Husband] was found guilty of three (3) counts of Aggravated Sexual Battery with a victim under the age of Thirteen (13), seven (7) counts of Sexual Battery by an Authority Figure and one (1) count of Sexual Battery without consent after a jury trial in ... the Davidson County Criminal Court. [Wife] would further submit that [Husband] was sentenced on the 18th day of March, 2005. [Wife] would further submit that [Husband] will not be eligible for parole until the year 2015.

Wife's motion to amend the complaint was granted by the Trial Court.

Husband then filed a motion seeking to have his interest in the marital estate retained by the Trial Court and used for his future child support payments. The Trial Court entered an order stating that Husband's motion to have his interest in the marital property held as child support was

² Don Turner's appraisal was attached to Husband's brief, but it is not part of the technical record on appeal so it cannot be considered by this Court. Due to the inadequacy of the record, we cannot ascertain whether the appraisal ever was admitted into evidence at trial.

“well taken but that it should be reserved and subsequently addresse[d] at the final hearing of this divorce action on October 10, 2005.”

Husband’s attorney withdrew from the case. Thereafter, Husband filed a pro se motion requesting to participate in the divorce trial by telephone. Husband requested the Trial Court:

allow him to participate by telephone communication in lieu of Court appearance by video communications technology, pursuant to TCA § 41-21-809³, in the above captioned case for the final hearing on the 10th day of October, 2005 at 9:00 A.M. Defendant would state that he is presently in prison, under the circumstances, it is impossible to be physically present at the final hearing.

The trial was conducted on October 10, 2005. The Trial Court apparently never ruled on Husband’s motion to participate in the trial by telephone. Following the trial, at which Husband did not participate, the Trial Court entered an order granting Wife a divorce. The order also provides:

It is, further, ORDERED, ADJUDGED and DECREED that any interest that [Husband] may have [in the marital residence] is divested from him and vested to [Wife]. It is, further, ORDERED, ADJUDGED and DECREED that [Wife] shall be responsible for all indebtedness associate[d] with said residence and shall hold [Husband] harmless therefrom. It is, further,

ORDERED, ADJUDGED and DECREED that due to [Husband’s] incarceration that his equity in said marital residence shall satisfy his child support obligation through September of 2004. It is, further, ORDERED, ADJUDGED and DECREED that after September of 2004, child support shall be held in abeyance and will not be excused due to the [Husband’s] incarceration. It is, further,

ORDERED, ADJUDGED and DECREED that [Wife] shall be awarded her entire 401(k) account free and clear of any claim from [Husband]. It is, further,

³ Tenn. Code Ann. § 41-21-809 (2006) provides that a “court may hold a hearing under this part at a county jail or a facility operated by the department or may conduct the hearing with video communications technology that permits the court to see and hear the inmate and that permits the inmate to see and hear the court and any other witnesses.”

ORDERED, ADJUDGED and DECREED that [Wife] shall be awarded all her individual bank accounts free and clear of any claim from [Husband]. It is, further,

ORDERED, ADJUDGED and DECREED that [Wife] shall be awarded all personal property currently in her possession free and clear of any claim from [Husband]. It is, further,

ORDERED, ADJUDGED and DECREED that [Husband] shall be awarded all personal property currently in his possession as well as a pickup truck that was at issue free and clear of any claim from [Wife]

The Trial Court then awarded sole custody of the parties' child to Wife and reserved the issue of visitation until Husband was released from prison. Although the Trial Court authorized telephone contact between Husband and the parties' child, the Trial Court stated that such telephone contact would be at the sole discretion of Wife. Finally, the Trial Court awarded Wife attorney fees in the amount of \$4,777.50.

Husband appeals raising several issues. First, Husband claims the Trial Court did not have jurisdiction to address issues pertaining to child custody and child support. Next, Husband claims that the Trial Court erred when it failed to rule on any of his pre-trial motions that were filed after his attorney withdrew from the case and once he began representing himself. Finally, Husband claims the Trial Court's distribution of the marital property was inequitable. Wife claims Husband's appeal should be dismissed because Husband failed to file a fair, accurate, and complete statement of the evidence as required by Tenn. R. App. P. 24(c).

Discussion

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

We first address Wife's argument that Husband's appeal should be dismissed for his failure to comply with Tenn. R. App. P. 24(c). This rule provides as follows:

(c) Statement of the Evidence When No Report, Recital, or Transcript Is Available. – If no stenographic report, substantially verbatim recital or transcript of the evidence or proceedings is available, the appellant shall prepare a statement of the evidence or

proceedings from the best available means, including the appellant's recollection. The statement should convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal. The statement, certified by the appellant or the appellant's counsel as an accurate account of the proceedings, shall be filed with the clerk of the trial court within 90 days after filing the notice of appeal. Upon filing the statement, the appellant shall simultaneously serve notice of the filing on the appellee, accompanied by a short and plain declaration of the issues the appellant intends to present on appeal. Proof of service shall be filed with the clerk of the trial court with the filing of the statement. If the appellee has objections to the statement as filed, the appellee shall file objections thereto with the clerk of the trial court within fifteen days after service of the declaration and notice of the filing of the statement. Any differences regarding the statement shall be settled as set forth in subdivision (e) of this rule.⁴

Relying on the argument that Husband's appeal should be dismissed for his failure to comply with Tenn. R. App. P. 24(c), Wife essentially ignores the various issues raised by Husband, devoting approximately one short paragraph of argument to each issue. What Wife fails to explain, however, is how Husband possibly could have prepared a full and accurate statement of the evidence when he was not allowed to participate in the trial.

Husband did prepare and file a statement of the evidence with the Trial Court. Not surprisingly since Husband was not allowed to participate in any way at trial, this statement of the evidence is best described as less than helpful. As Husband was unable to prepare a fair and accurate statement of the evidence because he was not afforded the opportunity to participate in the trial, some of the burden to prepare a full and accurate statement of the evidence fell to Wife. Tenn. R. App. P. 24(c) clearly states: "If the appellee has objections to the statement as filed, the appellee shall file objections thereto with the clerk of the trial court within fifteen days after service of the declaration and notice of the filing of the statement." Here, Wife filed no such response to Husband's admittedly lacking statement of the evidence. Under these circumstances, we refuse to dismiss Husband's appeal for his failure to comply with Tenn. R. App. P. 24(c).

Husband's first issue is his claim that the Trial Court lacked jurisdiction to adjudicate matters pertaining to child custody because a related dependant and neglect action was pending in the juvenile court. In her brief, Wife "concedes that jurisdiction over the parties' minor child should

⁴ Tenn. R. App. P. 24(e) provides: "Correction or Modification of the Record. If any matter properly includable is omitted from the record, is improperly included, or is misstated therein, the record may be corrected or modified to conform to the truth. Any differences regarding whether the record accurately discloses what occurred in the trial court shall be submitted to and settled by the trial court regardless of whether the record has been transmitted to the appellate court. Absent extraordinary circumstances, the determination of the trial court is conclusive. If necessary, the appellate or trial court may direct that a supplemental record be certified and transmitted."

be vested in Juvenile Court.” Given this concession, we vacate the Trial Court’s order insofar as it adjudicates matters pertaining to child custody and visitation.

Husband’s second issue surrounds his claim that the Trial Court erred in not allowing him to participate in the trial by telephone. Wife’s brief simply states that applicable law prevents removing an inmate from a penitentiary so that inmate can participate at trial in a civil case. *See* Tenn. Code Ann. § 41-21-304 (2006). Again, Wife misses the mark. Husband does not claim that he should have been transported from prison to attend the trial; rather, he simply requested that he be allowed to participate by telephone.

In *Bell v. Todd*, 206 S.W.3d 86 (Tenn. Ct. App. 2005), we gave the following insight into the effects of a trial court’s failure to rule on a prisoner’s pending motions when that prisoner is a party to the litigation:

Litigation involving self-represented litigants can be challenging and difficult. *Irvin v. City of Clarksville*, 767 S.W.2d 649, 651 (Tenn. Ct. App. 1988). It can become even more difficult and cumbersome when the self-represented litigant is incarcerated. *Chastain v. Chastain*, No. M2003-02016-COA-R3-CV, 2004 WL 725277, at *2 (Tenn. Ct. App. Mar. 22, 2004) (No Tenn. R. App. P. 11 application filed). However, an incarcerated litigant’s right to meaningful access to the courts requires that the litigant be afforded a fair opportunity to present his or her side of the controversy. *Knight v. Knight*, 11 S.W.3d 898, 903 (Tenn. Ct. App. 1999)....

Appellate courts frequently have been confronted with cases in which the trial courts have disposed of claims either filed by or asserted against self-represented prisoners without first addressing the prisoner’s pending motions. No matter whether the prisoner is the plaintiff or the defendant, reviewing courts have consistently held that trial courts err when they proceed to adjudicate the merits of the claim without first addressing the prisoner’s pending motion or motions. These oversights have generally been found to be prejudicial rather than harmless because the failure to address pending motions “give[s] the impression that a litigant is being ignored,” *Logan v. Winstead*, 23 S.W.3d at 303. We have also held that a prisoner’s failure to comply with local rules requiring motions to be set for hearing does not provide a trial court with an excuse for failing to address the pending motions. *Chastain v. Chastain*, 2004 WL 725277, at *2. Accordingly, when a trial court has failed to rule on an incarcerated litigant’s pending motions, reviewing courts have consistently

vacated the judgment and remanded the case to the trial court with directions to consider and act on the pending motions.

Bell, 206 S.W.3d at 91 (footnote omitted).

Knight v. Knight, 11 S.W.3d 898 (Tenn. Ct. App. 1999) involved a divorce case wherein the husband, who was incarcerated, filed a motion seeking transportation to the trial or that the trial be continued until his release from prison, which was to occur in the not-so-distant future. *Id.* at 899. The trial court in *Knight* never ruled on the husband's motion and proceeded with the trial. *Id.* On appeal, this Court discussed the evolution of the law in Tennessee regarding participation by inmate's in legal proceedings. We noted that there are various options available to a trial court "including, but not limited to, offering Husband the opportunity to testify by videotaped deposition, [or] allowing Husband to participate in the trial by telephone" *Id.* at 906. Because the trial court never ruled on the husband's motion and because none of the options available to the trial court were considered, we vacated the final divorce decree. *Id.* at 906-07.

Returning to the present case, we conclude that the Trial Court erred when it failed to rule on Husband's pending motions, including his motion to participate in the trial by telephone. Husband's motion to participate in the trial by telephone should have been considered by the Trial Court, and it should have been granted. We, therefore, vacate the final divorce decree in its entirety and remand this case for a new trial with directions that Husband be allowed to participate at trial by telephone.

Husband's final issue is his claim that the Trial Court's division of the marital property was inequitable. Because we have vacated the entire judgment, this issue is now moot. However, we direct the parties to Rule 7 of the Rules of the Court of Appeals. This Rule provides as follows:

RULE 7. BRIEFS IN DOMESTIC RELATIONS CASES

(a) In any domestic relations appeal in which either party takes issue with the classification of property or debt or with the manner in which the trial court divided or allocated the marital property or debt, the brief of the party raising the issue shall contain, in the statement of facts or in an appendix, a table in a form substantially similar to the form attached hereto. This table shall list all property and debts considered by the trial court, including: (1) all separate property, (2) all marital property, and (3) all separate and marital debts.

(b) Each entry in the table must include a citation to the record where each party's evidence regarding the classification or valuation of the property or debt can be found and a citation to the record where the

trial court's decision regarding the classification, valuation, division, or allocation of the property or debt can be found.

(c) If counsel disagrees with any entry in the opposing counsel's table, counsel must include in his or her brief, or in a reply brief if the issue was raised by opposing counsel after counsel filed his or her initial brief, a similar table containing counsel's version of the facts.

Rule 7 then gives an example of the type of table that is to be provided by the parties. In the present case, neither party complied with this Rule. Rule 7 must be complied with if this case is appealed in the future and there is any issue regarding the classification, valuation, or distribution of the property.

Conclusion

The judgment of the Trial Court is vacated and this cause is remanded for further proceedings consistent with this Opinion and for collection of the costs below. Costs on appeal are taxed to the Appellee, Leslie Roehm Reese.

D. MICHAEL SWINEY, JUDGE